

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

REVIEW OF FEDERAL COMMUNICATIONS	)	
COMMISSION'S TRIENNIAL REVIEW ORDER	)	CASE NO.
REGARDING LOCAL CIRCUIT SWITCHING	)	2003-00347
FOR DS1 ENTERPRISE CUSTOMERS	)	

O R D E R

On September 17, 2003, the Commission established this proceeding for two purposes: [1] to provide an opportunity for competitive local exchange carriers ("CLECs") within Kentucky to challenge the finding of the Federal Communications Commission ("FCC") that CLECs are not impaired without access to local circuit switching to serve end users using DS1 capacity and above loops; and [2] to determine whether the Commission should petition the FCC for a waiver of the "no impairment finding" for enterprise customers.<sup>1</sup> On October 2, 2003, SouthEast Telephone, Inc. ("SouthEast") filed a petition requesting that the Commission seek such a waiver from the FCC.

SouthEast, BellSouth Telecommunications, Inc. ("BellSouth"), Kentucky ALLTEL, Inc., Cincinnati Bell Telephone Company, and Competitive Carriers of the South, Inc. notified the Commission of their intent to participate as parties to this proceeding. Data

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<sup>1</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand, CC Docket No. 01-338, Rel. August 21, 2003 ("Triennial Review Order") at ¶¶ 451, 455.

requests were issued and information exchanged. A hearing was held November 25, 2003. The parties present at the hearing indicated to the Commission that they had no cross-examination of SouthEast's witnesses. The case was then submitted for decision.

SouthEast is a CLEC based in Pikeville, Kentucky offering service to 35 eastern and central Kentucky counties. It has approximately 4,500 local service subscribers, 13,000 Internet customers, and 110 DSL customers.<sup>2</sup> In addition, SouthEast serves five high-capacity retail end users utilizing DS1 technology through UNE-P provided by BellSouth.<sup>3</sup> These customers, located in the Pikeville wire center, generated annual revenue of \$190,669.70 for year-to-date 2003.<sup>4</sup> SouthEast contends it would be unable to provide cost-effective competitive services or pricing without UNE-P provisioning of DS1 circuits.<sup>5</sup> SouthEast alleges it will face an economic barrier to entry: self-provisioning expensive switching equipment.

The FCC determined that states are better positioned to gather and assess information necessary to implement the statutory goals for certain network elements.<sup>6</sup> Further, the FCC found that a granular analysis could illustrate whether a geographic market shows actual marketplace penetration and whether multiple wholesale providers

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<sup>2</sup> SouthEast (Maynard) prefiled testimony at 2.

<sup>3</sup> SouthEast October 2, 2003 Petition; SouthEast Response to Staff Data Request.

<sup>4</sup> SouthEast Response to Staff Data Request.

<sup>5</sup> Id.

<sup>6</sup> Triennial Review Order at 7.

were available to furnish facilities to CLECs in crafting possible competitive retail services.<sup>7</sup> According to the FCC, the burden of proof is on the petitioning CLEC.<sup>8</sup> After reviewing the state-specific granular information, the State Commission is to make a determination. If it makes “an affirmative finding of impairment,” then the state is to petition the FCC on behalf of the CLEC.<sup>9</sup>

According to the FCC, impairment may be found “when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.”<sup>10</sup> Granular analysis of impairment “is informed by consideration of the relevant barriers to entry, as well as a careful examination of the evidence, especially marketplace evidence showing whether entry has already occurred in particular geographic and customer markets without reliance on the incumbent LECs’ networks but instead through self-provisioning or reliance on third-party sources.”<sup>11</sup>

Not only must evidence on each of these items regarding impairment be presented by the petitioning CLEC, but the CLEC must provide evidence of operational and economic barriers in the details specified by the FCC. States may also define the relevant markets.<sup>12</sup> States are to look at specific operational criteria including “whether

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<sup>7</sup> Id. at ¶ 165.

<sup>8</sup> Id. at ¶¶ 451 and 455.

<sup>9</sup> 47 C.F.R. § 51.319 (d)(3)(i).

<sup>10</sup> Triennial Review Order at ¶ 84.

<sup>11</sup> Id.

<sup>12</sup> Id. at ¶ 455.

incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs.”<sup>13</sup> The FCC found that it lacked “sufficient specific evidence” concerning these operational criteria and therefore asked state commissions to consider such evidence.<sup>14</sup>

Moreover, state commissions are to review specific economic criteria. In order to rebut the FCC's finding that competitive LECs are not impaired, states “must find that entry into a particular market is uneconomic in the absence of unbundled local circuit switching.” Costs must be sufficient to prevent economic entry and not merely those that would be the kinds of costs any new entrant would bear.<sup>15</sup> States “must weigh competitive LECs' potential revenues from serving enterprise customers in a particular geographic market against the cost of entry into that market.”<sup>16</sup> States must consider all likely revenues from the enterprise market and prices that entrants are likely to charge.<sup>17</sup> Thus, in determining the cost of entry into a particular geographic market, this Commission must have before it evidence to consider the costs imposed by both operational and economic barriers to entry.<sup>18</sup>

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<sup>13</sup> Id. at ¶ 456.

<sup>14</sup> Id.

<sup>15</sup> Id. at ¶ 454, fn 1392.

<sup>16</sup> Id. at 457.

<sup>17</sup> Id.

<sup>18</sup> Id.

Though the FCC specified detailed evidence which must be presented to the Commission to overcome the national presumption against impairment, SouthEast merely offered generalized testimony. A market designation of “Pikeville” was assumed but no rationale or evidence of its appropriateness was offered.<sup>19</sup> SouthEast asserts that “the limited timeframe” of this proceeding and the “limited budget of CLECs such as SouthEast” make market-based cost studies too expensive to undertake.<sup>20</sup> Moreover, SouthEast merely asserts that loop costs and transport costs also form operational barriers but offer no specific evidence.<sup>21</sup>

SouthEast provided only general information regarding economic hardships by stating that rural markets such as Pikeville have too few DS1 customers to warrant provisioning of a CLEC switch.<sup>22</sup> SouthEast says that, with a total of approximately 81 DS1 enterprise customers in Pikeville and assuming a 10 percent market share – eight customers – an economically viable scale of operations could not be achieved.<sup>23</sup> These assertions with lack of supporting data and detailed analyses provide vastly insufficient evidence when compared to that required by the FCC’s order.

SouthEast has failed to provide specific evidence on those items required by the FCC for the state granular analysis. Accordingly, it has not borne the burden necessary

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<sup>19</sup> SouthEast (Maynard) prefiled testimony at 3.

<sup>20</sup> Id.

<sup>21</sup> Id. at 3 and 4.

<sup>22</sup> SouthEast (Roesel) prefiled testimony at 4.

<sup>23</sup> Id.

to overcome CLECs wishing to obtain unbundled local switching for service DS1 and above enterprise customers.

The Commission finds the record in this case insufficient to justify filing a petition with the FCC to obtain a waiver. The record is devoid of the required economic and operational analyses necessary to illustrate that a CLEC is impaired without access to local circuit switching to serve end users using DS1 capacity and above loops in a particular geographic market.

IT IS THEREFORE ORDERED that SouthEast's petition for a waiver is denied.

Done at Frankfort, Kentucky, this 23<sup>rd</sup> day of December, 2003.

By the Commission

ATTEST:

Deputy Wm H. I. Barker  
Executive Director